**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **ROBERT FEASEL**<br>Claimant<br>VS.<br><br>**USD #470**<br>Respondent<br>AND<br><br>**UNITED STATES FIDELITY & GUARANTY CO.**<br>Insurance Carrier<br>AND<br><br>**KANSAS WORKERS COMPENSATION FUND** | Docket No. 154,885 |

## ORDER

Respondent appeals an Award of Special Administrative Law Judge William F. Morrissey entered on May 11, 1994. The Appeals Board heard oral argument by telephone conference.

### APPEARANCES

Claimant appeared by and through his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

### RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of May 11, 1994.

### ISSUES

Respondent raised the following issues for Appeals Board review:

(1) Whether claimant suffered an accidental injury that arose out of and in the course of his employment with the respondent;
(2) Nature and extent of claimant's disability;

(3) Claimant's entitlement to unauthorized medical treatment;
(4) Claimant's entitlement to future medical treatment; and
(5) The liability of the Kansas Workers Compensation Fund.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, hearing arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The Special Administrative Law Judge found that the claimant was entitled to a twenty-three percent (23%) permanent partial general work disability for a work-related injury that occurred while the claimant was employed with the respondent on March 18, 1991. Respondent claims that the claimant fabricated the alleged injury in order to open up a doughnut franchise business. Respondent also argues that the claimant's low back problems were due to preexisting degenerative disc disease condition and were not caused or aggravated by an incident at work.

Claimant testified in these proceedings on three separate occasions, by deposition on September 25, 1991, at a preliminary hearing on October 29, 1991, and at a regular hearing deposition on January 27, 1993. Claimant's first description of his accident was that he felt pain in his lower back when he bent over to pick up cases of paint and liquid plastic that he and two of his fellow workers were moving to a storage area. Claimant then testified, over one year later during the regular hearing deposition, that he felt pain in his back while he was pulling the wagon loaded with paint and liquid plastic over the parking lot to the storage area. Additionally, two employees that claimant was working with that day testified that the claimant had not indicated to them nor did they observe that claimant had injured his back. Respondent asserts that these inconsistent descriptions of the accident and the two employees' testimony supports its argument that claimant's low back injury was not due to an incident that occurred at work.

On the date of claimant's injury, March 18, 1991, claimant had been employed as a maintenance person for the respondent for some seven years. Claimant testified that after he left work on March 18, 1991, his low back worsened and became more symptomatic. Because of the increased pain, he notified his supervisor, Leonard Rutter, the next day of his back injury and that he was going to see his own doctor, Dr. Pereira in Arkansas City. However, Dr. Pereira was on vacation so claimant was seen by Dr. Robert Morton who placed the claimant in Arkansas City Memorial Hospital for traction treatment for three days. Subsequently, respondent referred the claimant for further treatment of his back to Dr. Robert L. Eyster, an orthopedic surgeon, who had previously treated claimant for a low back problem in 1990.

Claimant was seen by Dr. Eyster on March 28, 1991 for this injury. By that time claimant had an MRI which showed some minor stenosis in his lower back region. Dr. Eyster prescribed a strengthening exercise program for the claimant. Claimant gave a history of injuring his low back at work on March 18, 1991 while he was lifting and carrying cases of paint and pulling a wagon. Claimant was taken off work and was also treated with trigger-point injections by Dr. Eyster. The claimant did not improve and, therefore, Dr. Eyster scheduled a myelogram and CT scan which showed no specific abnormalities which would be improved with surgery. By this time, claimant was having pain radiating down his right leg. Dr. Eyster made a further recommendation for the claimant to lose weight to help his symptoms. After the myelogram and CT scan, Dr. Eyster's final diagnosis was spinal stenosis with bulging disc without specific impingement. On September 19, 1991, Dr. Eyster opined that claimant had met maximum

medical improvement and released claimant to a job he could tolerate. It was Dr. Eyster's opinion that claimant had a seven percent (7%) functional impairment with restrictions of no single lift of over fifty (50) pounds, no repetitive lifts over thirty (30) pounds, no working in a bent-over position and no bending or twisting more than twelve (12) times a day.

Claimant suffered previous low back problems in 1987 and again during a more recent episode, which occurred August 9, 1990, claimant suffered a lumbar sacral strain with severe muscle spasms as he bent over to evaluate the cutting surface on a push-lawn mower at his home. At that time claimant had just completed a work day with the respondent which required him to be on a lawn mower all day cutting grass. He was treated by Robert A. Morton, M.D., with medication and taken off work. Because of claimant's continued symptoms, and Dr. Morton's diagnosis of a probable herniated disc, he referred the claimant to Dr. Eyster for examination and treatment. Dr. Eyster first saw the claimant for this injury on August 14, 1990, and diagnosed degenerative disc disease with impending herniation, but without an apparent herniation or rupture at that time. Dr. Eyster prescribed an extensive strengthening and stretching exercise program for the claimant. On August 29, 1990, Dr. Eyster released claimant to go back to work with instructions that he be careful with repetitive bending, twisting and excessive lifting, initially. Claimant testified he returned to his regular job for respondent and performed the job without incident until March 18, 1991.

Claimant presented the testimony of Dr. Ernest Schlachter, who had examined and evaluated the claimant at the claimant's attorney's request on May 20, 1992. Dr. Schlachter diagnosed the claimant as having disc disease of the lumbar spine. Dr. Schlachter opined that this diagnosis and the claimant's symptoms were consistent with the March 18, 1991 incident that involved the claimant lifting, carrying and moving some paint cans and containers of liquid fluids while employed by the respondent. Dr. Schlachter indicated that this activity permanently aggravated claimant's preexisting degenerative disc disease. Dr. Schlachter testified that the claimant had reached medical stability after his prior low back injuries which had occurred in 1987 and 1990. Claimant was able, after these instances, to return to his regular work activities. However, as a result of this aggravation, Dr. Schlachter opined that claimant could not return to the job he had been performing for the respondent. Dr. Schlachter placed permanent work restrictions for the claimant to follow of no single lift of more than forty (40) pounds; no repetitive lifting of more than thirty-five to forty (35-40) pounds; and no repetitive bending, lifting or working in awkward positions. Dr. Schlachter also opined that claimant sustained a ten percent (10%) functional impairment as a result of his low back injury.

The respondent, through its insurance carrier, vigorously defended this particular claim. One of the methods utilized by the defense was the hiring of an investigator who observed and completed video taped surveillance of the claimant working in his woodworking shop at his residence, located outside of Arkansas City, Kansas, in the latter part of August 1991. The video tape showed the claimant performing various activities while making certain small items out of wood. He was standing, moving from different machines and benches and was seen in a sitting position working. Claimant was observed bending at the waist on occasion. Dr. Eyster was given an opportunity to view the video tape in October 1991, after he released claimant with permanent work restrictions and a functional impairment rating on September 19, 1991. As a result of Dr. Eyster's observations, he concluded claimant did not have the amount of subjective pain as claimant had related to him during the numerous office visits which he had with the claimant since his alleged accident of March 18, 1991. Dr. Eyster, at that time, changed his opinion and only related claimant's permanent impairment to his degenerative disc disease and revised claimant's work restrictions to the 1990 restrictions of no working for

prolonged period of time in a bent-over position and no prolonged standing or walking. However, on cross-examination by claimant's attorney, Dr. Eyster opined that claimant's job duties that he performed while employed by the respondent as a maintenance person would aggravate his degenerative disc condition. Dr. Eyster further testified, although he did not specifically recall, that he would have advised the claimant, during treatment, to perform any activity that he could tolerate that would not aggravate his back, including working in a woodworking shop. Dr. Eyster also admitted that claimant, during the video tape, was not lifting weights that exceeded fifty (50) pounds and had not lifted weights repetitively that exceeded thirty (30) pounds. Dr. Schlachter also observed the same video tape of the claimant working in the woodworking shop and was of the opinion that there was nothing in the video tape inconsistent with his diagnosis of claimant's condition.

The Appeals Board finds that the claimant has established, through his testimony and the medical testimony of Dr. Schlachter and Dr. Eyster, that he permanently aggravated his preexisting low back degenerative disc disease while he was performing his regular work activities for the respondent on March 18, 1991. Although, Dr. Eyster changed his opinion to the effect that claimant's functional impairment and work restrictions did not change due to this accident, Dr. Eyster, nevertheless, did admit that claimant's job as a maintenance man would aggravate his degenerative disc condition if he were to return to those job duties. In contrast, Dr. Eyster, after claimant's 1990 low back problem, returned claimant to his regular work with the respondent. Claimant established that after the 1990 incident he returned to his regular work and performed his job activities without symptoms until the accident of March 18, 1991. Dr. Schlachter, on the other hand, clearly attributes the lifting and pushing accident of March 18, 1991, as described by the claimant, to a permanent aggravation of his preexisting disc disease resulting in permanent impairment and work restrictions.

(2) The respondent terminated the claimant effective July 1, 1991 while he remained under treatment for his low back injury with Dr. Eyster. Mr. Calvin Chandler, Assistant Superintendent in charge of personnel for the respondent, testified on July 23, 1992 that claimant was not offered continued employment with the respondent after he was released from treatment in September 1991. Also, the respondent, as of the date of Mr. Chandler's deposition, had not attempted to accommodate claimant's work restrictions. Mr. Chandler verified that he had knowledge that claimant had injured his back at work on March 18, 1991. In accordance with the school district's policy, he had claimant complete, on March 20, 1991, an accident report. Mr. Chandler also established that respondent had knowledge that claimant had previous low back problems and was, in fact, taken off work in 1988 and 1990 because of those problems. However, Mr. Chandler did not have knowledge that claimant had prior work restrictions because of his preexisting back problems.

In a letter dated September 17, 1992, the claimant notified Mr. Chandler, Assistant Superintendent for the respondent, that he was ready, willing and able to accept any employment with the respondent within his permanent restrictions paying a comparable wage. As a result of that letter, Mr. Chandler offered claimant a job as a full time custodial substitute at a comparable wage. A job description was attached to the offer. The claimant reviewed the job description and then notified his attorney that, in his opinion, the job did not fall within the permanent work restrictions as designated by Dr. Eyster. Claimant was familiar with these job duties, as he either observed or completed some of the job duties while he was working for the respondent. It was claimant's opinion that the job duties would require him to violate his work restrictions that limited his bending, twisting, lifting and prolonged standing. The job description was admitted into evidence during the claimant's regular hearing testimony. It specified that the job duties were

sweeping, dusting, mopping, vacuuming, picking up trash, emptying trash containers, cleaning restrooms and cleaning windows. In order to qualify for the job, an individual would have to possess the physical health adequate to meet the demands of the job. The job description went on to specify the physical requirements which consisted of prolonged (over 75% of the time) standing and walking, plus occasional requirements to manually move, lift, carry, pull or push, heavy (over 50 pounds) objects.

The respondent argued that if this claim is found to be compensable then the claimant is limited to functional disability because the full time custodial substitute job offered to the claimant was a job the claimant had the ability to perform within his permanent work restrictions at a comparable wage. Therefore, the respondent contends that the presumption against work disability that is contained in K.S.A. 1990 Supp. 44-510e(a) applies and claimant's disability is limited to his functional impairment. The Appeals Board recognizes that if facts establish that a claimant refuses to return to a job that is offered by the respondent at a comparable wage that he has the ability to perform within his permanent restrictions, then the presumption against work disability will be applied. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). However, the Appeals Board finds that the job offered the claimant by the respondent was not within either Dr. Schlachter's or Dr. Eyster's permanent restrictions. The job description specifically indicated that the job duties claimant would have been required to perform violated Dr. Eyster's permanent work restrictions of no excessive bending, twisting and prolonged standing or walking. The job duties also violated Dr. Schlachter's weight restrictions and restrictions of no repetitive bending and lifting or working in awkward positions. Accordingly, it is the finding of the Appeals Board that the presumption of no work disability does not apply in this case.

After being released to return to work with permanent work restrictions by Dr. Eyster, claimant was not able to find permanent employment until July 17, 1992, when he was employed as a habilitation training specialist for the Sheltered Workshop of Payne County, Oklahoma. Claimant testified that these job duties consisted of teaching mentally retarded individuals how to take care of themselves, such as instructing them in personal hygiene. At the time claimant's testimony was taken for regular hearing purposes on January 27, 1993, claimant had changed employment and was employed by Edwin Fair Community Mental Health Center in Ponca City, Oklahoma. Claimant testified that both of these jobs were within the permanent restrictions placed on him by Dr. Eyster and Dr. Schlachter. Claimant's wages in these two jobs were stipulated by the parties as being two hundred seventy-two dollars and twenty-seven cents ($272.27) per week at Sheltered Workshop and two hundred eighty-one dollars and ninety-five cents ($281.95) per week at Edwin Fair Community Mental Health Center.

Claimant established during his testimony that his back became symptomatic after sitting or standing for more than a fifteen to twenty (15-20) minute period of time. Pain also resulted from bending, stooping or lifting. Such pain radiated into his buttocks and down both legs. Claimant also testified that due to his continuing back pain that he was limited in the activities that he performed both at work and at home.

With regard to the work disability issue, the record contains work disability evidence presented by Jerry Hardin, human resource consultant, testifying on behalf of the claimant. The respondent did not present evidence on work disability and, therefore, Mr. Hardin's testimony is uncontradicted. Mr. Hardin determined, after taking a history from the claimant and taking into consideration claimant's previous work experience and capacity for vocational rehabilitation that, in his personal opinion, claimant had lost fifty to sixty percent (50-60%) of his ability to perform work in the open labor market based on Dr.

Schlachter's work restrictions. Mr. Hardin also used the Labor Market Access Plus computer program which resulted in a forty-six percent (46%) loss of claimant's ability to perform work in the open labor market utilizing Dr. Schlachter's restrictions. The respondent argues that since Dr. Eyster was claimant's treating physician, his work restrictions should be utilized by Mr. Hardin in arriving at the claimant's loss of ability to preform work in the open labor market. The respondent further asserts that since Dr. Eyster's restrictions are the same now as they were prior to the March 18, 1991 injury, the claimant has not suffered any loss of his ability to perform work in the open labor market. The Appeals Board finds, however, based on the whole evidentiary record, that the work claimant performed prior to this accident exceeded the work restrictions that were placed on the claimant in 1990. The Appeals Board also finds the record is questionable as to whether the work restrictions of Dr. Eyster in 1990 were intended to be permanent or temporary restrictions. Accordingly, the Appeals Board finds that the most appropriate labor market loss is Mr. Hardin's personal opinion of fifty-five percent (55%).

The Special Administrative Law Judge found that the claimant had not lost any ability to earn a comparable wage as a result of his injuries. The Appeals Board disagrees with this finding as the Appeals Board has found that the job that was offered to the claimant was not within claimant's permanent work restrictions. Mr. Hardin opined that claimant had a thirteen percent (13%) loss of ability to earn a comparable wage and the Appeals Board agrees. The evidentiary record established that the claimant was earning post-injury two hundred eighty-one dollars and ninety-five cents ($281.95) per week and the claimant's average weekly pre-injury wage was three hundred twenty-three dollars and sixteen cents ($323.16) for a thirteen percent (13%) comparable wage loss.

Accordingly, the Appeals Board finds that the claimant is entitled to a work disability of thirty-four percent (34%) by giving equal weight to both claimant's loss of ability to perform work in the open labor market of fifty-five percent (55%) and loss of ability to earn a comparable wage of thirteen percent (13%) as approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(3) The Appeals Board affirms the finding of the Special Administrative Law Judge that the claimant should be awarded unauthorized medical expenses up to $350.00 as provided by K.S.A. 1990 Supp. 44-510(c) upon presentation of proof of such expense.

(4) The Appeals Board further affirms the Special Administrative Law Judge's order that claimant is entitled to future medical benefits upon proper application to the Director of Workers Compensation.

(5) The respondent appeals the decision of the Special Administrative Law Judge that apportioned liability for compensation benefits paid in this case of one-half to the respondent and one-half to the Kansas Workers Compensation Fund (Fund). Respondent contends that liability should be assessed one hundred percent (100%) to the Fund. The Appeals Board agrees with the respondent in this instance. The respondent has presented facts that prove that the Fund should be liable for all the compensation benefits and costs paid in this matter.

In order to shift liability from the respondent to the Fund, respondent has the burden to prove that it had knowledge of a preexisting impairment at the time the respondent employed the handicapped employee or at the time the respondent retained the handicapped employee in its employment after obtaining such knowledge. See K.S.A. 1990 Supp. 44-567(b). The respondent presented the testimony of Thomas Hagan, claimant's supervisor from 1987 through 1990, who testified that he knew claimant had

back problems during this period of time. Mr. Hagan knew that claimant was taking chiropractic treatments for a low back problem. Claimant presented Mr. Hagan with work restrictions from the chiropractor as early as 1988. Although these restrictions were later released by another doctor, Mr. Hagan considered the claimant, at that time, handicapped and temporarily made certain minor job modifications in order to prevent claimant from further injuring himself.

Both Dr. Eyster and Dr. Schlachter testified that after claimant's accident in August of 1990, that claimant had a seven percent (7%) impairment of function rating. Dr. Schlachter specifically testified that the claimant's March 1991 incident at work permanently aggravated claimant's preexisting low back condition and such permanent aggravation would not have occurred but for the preexisting condition. Accordingly, the Appeals Board finds that the respondent has presented facts in this case to sustain its burden of proof that claimant had a preexisting disc disease in his low back that was a physical impairment of such character that it constituted a handicap to the claimant in obtaining or retaining employment. Claimant's resulting disability from the accident which occurred while employed by the respondent on March 18, 1991 would not have occurred but for his preexisting physical impairment. See K.S.A. 44-566 and K.S.A. 1990 Supp. 44-567(a)(1)(b).

All other findings of Special Administrative Law Judge William F. Morrissey, in his Award of May 11, 1994 are incorporated herein and are made a part hereof as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed herein.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated May 11, 1994, should be, and hereby is, modified as follows:

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Robert D. Feasel, and against the respondent, U.S.D. #470, and its insurance carrier, United States Fidelity and Guaranty Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on March 18, 1991, and based on an average weekly wage of $323.16.

Claimant is entitled to 27 weeks of temporary total disability compensation at the rate of $215.45 per week or $5,817.15, followed by payment of $73.25 per week for 388 weeks or $28,421.00, for a 34% permanent partial general work disability, making a total award of $34,238.15.

As of January 31, 1996, there is due and owing the claimant 27 weeks of temporary total disability compensation at the rate of $215.45 per week in the sum of $5,817.15, plus 227.43 weeks of permanent partial disability compensation at $73.25 per week in the sum of $16,659.25 for total due and owing of $22,476.40 which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of $11,761.75 shall be paid at $73.25 per week for 160.57 weeks until fully paid or further order of the Director of Workers Compensation.

Future medical benefits will be awarded only upon proper application to and approval of the Director.

Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expenses.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The Kansas Workers Compensation Fund is ordered to pay all compensation benefits awarded in this case.

All fees and expenses are hereby assessed to the Kansas Workers Compensation Fund to be paid direct as follows:

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| William F. Morrissey | |
| Special Administrative Law Judge | $150.00 |
| Ireland & Barber | |
| Transcript of Preliminary Hearing | $222.70 |
| Deposition of Robert L. Eyster, M.D. | $320.80 |
| Ireland Court Reporting | |
| Transcript of Regular Hearing | $ 99.20 |
| Deposition of Jerry D. Hardin | $390.10 |
| Kelley, York & Associates | |
| Deposition of Robert D. Feasel (9-25-91) | Unknown |
| Barber & Associates | |
| Deposition of Calvin Chandler | Unknown |
| Ballard Reporting Service | |
| Deposition of Stanley D. Thomison (9-11-91) | Unknown |
| Todd Reporting | |
| Deposition of Ernest R. Schlachter, M.D. | $193.80 |
| Rachael Roper | |
| Deposition of James Perrymore | Unknown |
| Deposition Services | |
| Deposition of Robert D. Feasel (1-27-93) | $883.60 |
| Deposition of Thomas A. Hagan, Sr. | $236.20 |
| Deposition of Lois Jennings | $195.00 |
| Deposition of Raymond Schmidt | $175.00 |
| Deposition of Sharon Reed | $140.00 |
| Deposition of Barbara Scott Girard | $ 95.00 |
| Deposition of Stanley D. Thomison (2-25-93) | $213.60 |

**IT IS SO ORDERED.**

Dated this ____ day of February 1996.

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BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, Kansas
Kim R. Martens, Wichita, Kansas
Scott J. Mann, Hutchinson, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director